IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1447 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHARADBHAI NATHUBHAI TANDEL & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR.RUSHABH SHAH, LD. ADVOCATE FOR MR.J.B.PARDIWALA for Appellants.
MR.BHATE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/11/2007

ORAL JUDGMENT

Heard Mr.Rushabh Shah, learned Advocate appearing on behalf of Mr.Pardiwala, learned Advocate for the appellants and Mr.Bhate, learned A.P.P., appearing on behalf of the respondent-State.

2. This appeal is preferred against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track Court, Valsad, passed in Sessions Case (Old) No.100 of 1996 Sessions Case (New) No.84 of 2002, on 14th November, 2003, whereby the appellants were charged and tried for the offence punishable under Section 302 read with Section 114 of the Indian Penal Code. However, on conclusion of the trial the learned trial Judge held the appellants-accused guilty of the charge of offence punishable under Section 304 (2) of the Indian Penal Code read with Section 114 of the Indian Penal Code and sentenced them to undergo five years rigorous imprisonment and to pay a fine of Rs.2,000/- and in default punishment is of two months rigorous imprisonment.

3. The case of prosecution in brief is that accused Nos.1 and 2 are the neighbours of the family of the deceased. It appears that sometime back the deceased had lost his son i.e. his son had passed away and the deceased always labelled under an impression that mother of the accused Nos.1 and 2-Shantiben is a witch and Shantiben is responsible for the death of the son of the deceased. Because of

this impression in the mind of the deceased they used to frequently quarrel as the family members of the accused family did not like the deceased mentioning and labelling Shantiben as a witch. As per case of prosecution on 11th March, 1996 at 21:00 hrs., the deceased all of a sudden remembered his son Santosh who had passed away two years back and due to this the deceased uttered that some witch has eaten away my son. On hearing this accused Nos.1 and 2 and their mother Shantiben picked up quarrel. When the altercation in words were going on, accused Nos.1 and 2 assaulted the deceased with fisticuffs on the chest region as a result of which the deceased fell down unconscious and died. Thereafter, the offence was registered, case was investigated and on completion of the investigation as sufficient evidence was found to link the accused with the crime, charge-sheet came to be filed.

4. Mr.Shah, learned Advocate for the appellants has taken this Court through the various grounds of challenge as well as oral and documentary evidence led by the prosecution including the Panchnama of place of incident Exh.19. It is not a matter of dispute that the accused persons were neighbors of

the deceased in a residential area so one could easily hear the words uttered loudly by any of the person who is standing outside of once house. This is the nature of evidence led. So, it is submitted by Mr.Shah that learned trial Judge if was satisfied on evidence that accused persons were responsible in giving kick and fist blows to the deceased, none of the accused could have been convicted for the offence graver than punishable under Section 325 of the Indian Penal Code. It is also submitted that even if the person dies on receiving kick and fist blows, the accused cannot be linked with the serious offence punishable either under Section 302 or 304 (Part-II) of the Indian Penal Code, in absence of other incriminating evidence.

5. It is also submitted that appellant No.2-original accused No.2 at relevant point of time was young boy of nineteen years of age. The learned trial Judge has not even cared to consider the scheme of Section 6 of the Probation of Offenders Act. The accused No.2 had remained in jail initially after his arrest and thereafter was released on bail. The appellant No.1-original accused No.1 is at present in prison and therefore this Court may alter the

conviction from the charge of offence punishable under Section 304 (Part-II) into Section 325 read with Section 114 of the Indian Penal Code. There was no scope for the accused to share any intention is the main point of submission. The anger of both the accused was natural because their mother was addressed as witch by the deceased before couple of minutes of the incident, i.e. the act of assault on the deceased. The evidence thus says that the deceased had given cause for excitement / provocation to the accused persons and the learned trial Judge has failed to consider this aspect which are very relevant.

6. Mr.Bhate, learned A.P.P., after going through the evidence led by prosecution mainly relied on the evidence of eye-witnesses examined and the postmortem note (Exh.15) and has submitted that no mark of external injuries were noticed by the doctor on the body of the person deceased at the time of performing autopsy. However, the lungs were found ruptured because of fracture in rib. It appears that severe blows must have been given with force to the deceased otherwise deceased would not have sustained such fractures resulting into compound rib fractures.

As the incident has occurred suddenly and deceased was responsible for giving cause of quarrel, the learned trial Judge could have recorded the conviction under Section 325 instead of 304 (Part-II) of the Indian Penal Code.

7. Having considered the oral as well as documentary evidence mainly the postmortem note and substratum of the story of prosecution placed by the prosecution, the Court is of the view that the conviction recorded by the learned trial Judge for the offence punishable under Section 304 (Part-II) of the Indian Penal Code is bad and is not sustainable in the eye of law. It is not necessary to quote the whole Section 304 of the Indian Penal Code, mainly the later part of that Section. Unless the act is found to be an act of committing culpable homicidal, the accused cannot be linked with the crime punishable either under Section 302 or 304 (Part I or II) of the Indian Penal Code.

8. The recording of a finding that guilt has been established i.e. commission of criminal wrong by the accused is one aspect and to link the accused with particular crime punishable under particular

Section is altogether a different one. The learned trial Judge perhaps has not thought that whether the accused can be held guilty of the charge of offence punishable under Section 325 of the Indian Penal Code in correct perspective. Mr.Shah, learned Advocate has not challenged the credibility of the witnesses examined about the involvement of the accused in the incident and it is not therefore necessary to go into the detailed discussion of the evidence led by prosecution.

8.1 In absence of mark of violence on the body of the person deceased, has a direct bearing on the ultimate finding and therefore this Court is inclined to held that the appellants-accused could have been held guilty of the charge of offence punishable under Section 325 read with Section 114 of the Indian Penal Code. Finding is therefore recorded accordingly. The quantum of punishment obviously shall have to be reduced keeping in mind the totality of facts that have emerged from the evidence led and the case placed by prosecution. When the appellant-accused No.1 at present is undergoing imprisonment and has already passed four years in the prison so he can be set at liberty considering the period of imprisonment

already undergone, as sufficient punishment.

8.2 The appellant No.2-original accused No.2 is at present enjoying bail. He was about 19 years of age at the time of incident and therefore he can be given the benefit of scheme of Sections 3 and 6 of the Probation of Offenders Act read with Section 361 of the Criminal Procedure Code. Earlier, when this appeal was listed for hearing this Court has called for the report of the District Probation Officer, Valsad and in compliance of the order passed by this Court on 29th October, 2007 the report was received and lying with the Registry. The original report has been called for and upon opening the sealed envelope, this Court has considered the report which needs to be clarified. The report clearly supports the reformative theory which requires to be complied with in certain cases. Considering the quantum of punishment prescribed for the offence punishable under Section 325 of the Indian Penal Code, the accused is liable to get the statutory advantage of the scheme of Probation of Offenders Act, even there is nothing adverse in the report submitted by the District Probation Officer. True it is that the report can show the social and psychology situation

of the period round about when the family of the accused was approached or scrutiny as to moral character of the accused is evaluated. The report of the Probation Officer would obviously help the accused and same is taken on record. Thus, the appellant No.2-original accused No.2 being a person accused held the guilty of the charge of offence punishable under Section 325 read with Section 114 of the Indian Penal Code.

9. In aforesaid view of the discussion, present Appeal is partly allowed. The judgment and order of conviction passed by the learned Additional Sessions Judge, Fast Track Court, Valsad, passed in Sessions Case (Old) No.100 of 1996 Sessions Case (New) No.84 of 2002, on 14th November, 2003, recorded under Section 304 (Part-II) read with Section 114 is hereby altered and converted into conviction under Section 325 read with Section 114 of the Indian Penal Code, without altering the sentence of fine.

9.1 So far as appellant No.1-original accused No.1 is concerned, the period of substantive sentence imposed by the trial Court is reduced to the period already undergone and appellant No.1-original accused

No.1 is ordered to be set at liberty forthwith, if not required in any case.

9.2 So far as the the appellant No.2- original accused No.2 is concerned, the substantive sentence imposed by the learned trial Court is altered and reduced to three years while giving the benefit of probation under Section 3 and 6 of the Probation of Offenders Act read with Section 361 of the Criminal Procedure Code, 1973.

9.3 The appellant No.2-original accused No.2 is directed to execute a bond of good behaviour for Rs.5,000/- (Rupees Five Thousand Only) with one surety of the like amount for a period of one year under the scheme of Section 3 and 6 of the Probation of Offenders Act read with Section 361 of the Criminal Procedure Code, 1973 within period of 15 days from the date of receipt of the writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant No.2-original accused No.2 and he will be liable to serve the substantive sentence. Bond to be executed before the concerned trial Court. The substantive sentence altered and reduced to three years obviously shall

remain under suspension till the period of bond of good behaviour i.e. for one year and shall become inoperative on completion of the period.

9.4 In case of violation of any of the terms and conditions of the bond of good behaviour, the trial Court is at liberty to issue warrant against the appellant No.2-original accused No.2 for serving the substantive sentence.

9.5 The Bail Bond executed by the appellant No.2-original accused No.2 shall stand discharged the date on which the appellant No.2-original accused No.2 executes the bond of good behaviour before the trial Court.

9.6 Registry is directed to send the writ of this Farad immediately to the Jail Authority where the appellant No.1-original accused No.1 is serving the sentence. Order and Direction accordingly.

(C.K.BUCH, J.)

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